

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



**HEARING BEFORE THE UNITED STATES HOUSE SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET**

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INTRODUCTION

Chairman Johnson, Ranking Member Issa, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today to present the views of the Office of the Attorney General for the District of Columbia on the Supreme Court’s “shadow docket.”

As the Solicitor General of the District of Columbia, I defend the District’s laws against administrative and constitutional challenges and represent the District’s interests in affirmative litigation. In these dual roles, the Office of the Attorney General for the District of Columbia finds itself practicing before the Supreme Court and advising District clients on pressing legal issues informed by the Court’s rulings. The Office has experienced first-hand the increasing frequency with which the Supreme Court disposes of contentious or novel legal issues not through the traditional certiorari and merits process, but through its so-called “shadow docket.” In my testimony today, I’d like to discuss how the shadow docket has grown, why that growth should concern us, and what this Subcommittee might do in response.

I. Understanding the “Shadow Docket”

The Supreme Court’s merits docket is well known. It is largely comprised of the 70-or-so cases each year in which the Justices grant review, receive full briefing from the parties and *amici curiae*, hear oral argument, and issue signed opinions explaining the disposition of the case. The Court also has an “orders” docket, where it rules on procedural matters and requests for emergency relief before a case is placed on the merits calendar. Most of the rulings on the orders docket involve litigation management, like setting timelines, granting or denying requests to hear cases on the merits, or dismissing frivolous requests for emergency relief. *See, e.g.*, Order List, 592 U.S. ____ (Jan. 11, 2021).² It is thus not surprising that these orders are characterized by short (often one

¹ I am extremely grateful to Assistant Attorneys General Andrew J. Delaplaine and Harrison M. Stark for their assistance in preparing today’s written testimony.

² Available at <https://bit.ly/37bewys>.

sentence) dispositions and involve limited party participation, minimal briefing, and no oral argument.

The orders docket has long been a part of the Court’s established practice. Indeed, the first action ever taken by the Court was in the form of an order, in which the Court’s first Clerk recorded the absence of a required quorum and the Court adjourned, forced to wait another day for an additional Justice to arrive. Jack Metzler, *The Quorum Rule*, 23 *The Green Bag* 2d 103, 104 (2020). Between 1802 and 1839, Congress required a single Justice to come back to Washington for a “rump” session each August to dispose of, among other things, pending procedural issues for which the full Court’s consideration was unnecessary. Ross E. Davies, *The Other Supreme Court*, 31 *J. Sup. Ct. Hist.* 221, 224 (2006). And over time, Congress has enshrined the Court’s power to fashion “emergency” relief through multiple statutes, generating additional matters that are disposed of on the orders docket. *See* All Writs Act, 28 U.S.C. § 1651(a) (authorizing the Court to issue “all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”); 28 U.S.C. § 2101(f) (“In any case in which the final judgment or decree of any court is subject to review by the Supreme Court . . . the execution and enforcement of such judgment or decree may be stayed for a reasonable time . . . by a justice of the Supreme Court.”).

While the orders docket is largely comprised of procedural or pedestrian matters, there are occasions where the Court decides a significant issue—allowing an execution, staying a lower court order, summarily reversing a case—without the benefit of full briefing and argument and without issuing a signed majority opinion. Historically, these decisions, while practically significant, were mostly legally unremarkable; although the Court occasionally decided controversial or novel questions via its orders docket because of their time-sensitivity, addressing significant issues through order was the exception, not the rule.

That has changed. Recently, the Court has addressed numerous high-profile issues—issues we might normally consider worthy of the Court’s merits docket—via summary orders. The increasing frequency with which the Court has ruled on important, high-profile, or controversial questions on the orders docket has led to greater public scrutiny, and Professor Will Baude coined the term “shadow docket” to refer to this “range of orders and summary decisions that defy [the Court’s] procedural regularity.” William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 *N.Y.U. J. L. & Liberty* 1, 1 (2015). The Court’s recent shadow docket practice implicates important questions about consistency and transparency, and it is the focus of my testimony today.

II. The Increasing Importance of the Shadow Docket

The reason we are here today is that the Supreme Court is increasingly issuing summary stays or injunctions in high-profile cases addressing issues of paramount public importance: immigration, the validity of entire state electoral systems, separation of powers, the death penalty, and more. Although these orders are usually not the final disposition of the case, the stay or injunction—in effect, a “pause” often designed to preserve the status quo—may deprive a lower court ruling of legal effect. These orders have enormous practical consequences not just for the litigants involved, but also for localities, states, and even the entire nation in highly sensitive areas of the law. And, in some cases, the shadow docket decision may even be the final decision in the case.

The enormous impact of the Court’s shadow docket rulings can be seen in the following areas:

A. The 2020 Election

Several of the Supreme Court’s election orders, despite being styled as interim decisions, effectively decided the rules and procedures that would apply for votes cast in the November 2020 election.

In *Middleton v. Andino*, for example, a district judge issued, in light of the coronavirus pandemic, an order preventing South Carolina from enforcing its requirement that mail-in ballots be verified by a signature in the presence of another individual. No. 3:20-cv-01730, 2020 WL 5591590, at *38 (D.S.C. Sept. 18, 2020). In an unsigned, two-paragraph decision issued on October 5, less than one month before the November election, the Supreme Court stayed the district court’s order “pending disposition of the appeal” in the Fourth Circuit and any petition for certiorari. *Andino v. Middleton*, 141 S. Ct. 9, 9-10 (2020) (mem.). The Court limited its stay so that “ballots cast before th[e] stay issue[d] and received within two days of th[e] order” could “not be rejected for failing to comply with the witness requirement.” *Id.* at 10. Justices Thomas, Alito, and Gorsuch indicated, without further explanation, that they would have granted the state’s application for a stay in full. *Id.* at 10. As merely a procedural “order,” that ruling came without advance warning and without a formal, published opinion. But for the voters of South Carolina, the Supreme Court’s decision effectively ended the dispute, because all mail-in ballots received after October 7 needed to comply with the state’s original witness requirement. *See, e.g.*, Press Release, South Carolina Election Commission, Witness Signature Required for Mail-In Ballots (Oct. 6, 2020).³

That order typified the Court’s practice in the run-up to the election. In another case involving voter accessibility, a district judge issued an order on September 30 lifting Alabama’s ban on curbside voting, finding that the ban violated the plaintiffs’ fundamental right to vote. *See People First of Ala. v. Merrill*, No. 20-cv-619, 2020 WL 5814455 (N.D. Ala. Sept. 30, 2020). After the Eleventh Circuit declined to stay this order, *Merrill v. People First of Ala.*, No. 20-13695-B, 2020 WL 6074333 (11th Cir. Oct. 13, 2020), Alabama sought a stay from the Supreme Court to reinstate its ban on curbside voting. Again, in a one-paragraph, unsigned order issued on October 21, the Court stayed the district court’s order pending appeal in the Eleventh Circuit. *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (mem.). Justice Sotomayor, joined by Justices Breyer and Kagan, dissented, explaining that Alabama’s Secretary of State did not “meaningfully dispute that the plaintiffs have disabilities, that COVID-19 is disproportionately likely to be fatal to these plaintiffs, and that traditional in-person voting will meaningfully increase their risk of exposure.” *Id.* at 27 (Sotomayor, J., dissenting from grant of stay). For those counties that wished to implement curbside voting on Election Day, the Court’s order ended the matter. *See Madeleine*

³ Available at <https://bit.ly/3pjWSP0>.

Carlisle & Abigail Abrams, *The Supreme Court's Alabama Ruling Could Disenfranchise Thousands of High Risk Voters*, Time (Oct. 23, 2020).⁴

Similarly, the Court's shadow docket decisions affected *when* voters could cast their votes in the 2020 election. In a pair of one-sentence orders, an equally divided Court declined to stay an extended deadline for mail-in ballots set by the Pennsylvania Supreme Court. *See Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (2020) (mem.); *Scarnati v. Boockvar*, 141 S. Ct. 644 (2020) (mem.); *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 385 (Pa. 2020) (permitting mail-in votes that were mailed on or before Election Day to be counted as long as they were received by November 6). And less than one week before Election Day, the Court rejected a request to issue an injunction against the North Carolina Board of Elections, which had also extended its receipt deadline for mail-in ballots. *Moore v. Circosta*, 141 S. Ct. 46 (2020) (mem.). Justice Thomas indicated that he would have granted the application for an injunction, and Justice Gorsuch, joined by Justice Alito, issued a written dissent. *Id.*

B. The COVID-19 Pandemic

The Supreme Court has also issued several shadow docket rulings that, while styled as interim decisions, had an immediate impact on states' abilities to enforce pandemic restrictions affecting religious gatherings. Two of the Court's shadow docket orders—with the dissent of Justices Thomas, Alito, Gorsuch, and Kavanaugh—rejected challenges from churches to governmental restrictions on the size of religious gatherings during the pandemic. *Calvary Chapel Dayton Vall. v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.) (denying request to enjoin Nevada regulation limiting attendance at places of worship to 50 people); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.) (denying request to enjoin California's restriction on attendance at places of worship to 25 percent of building capacity or a maximum of 100 attendees).

But more recent shadow docket decisions have sharply curtailed states' pandemic regulations. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam) (enjoining New York's 10- and 25-person occupancy limits for churches pending appeal). Two weeks ago, in response to a challenge concerning California's new restrictions, the Court issued two unsigned, one-paragraph orders enjoining the state from enforcing its prohibition on indoor worship services in "Tier 1" counties, which have the highest COVID-19 transmission rates, while allowing other restrictions to stand. *S. Bay Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021) (mem.); *Harvest Rock Church v. Newsom*, No. 20A137, 2021 WL 406257 (U.S. Feb. 5, 2021) (mem.). These decisions fractured the Court, spawning multiple opinions and statements about the Justices' respective positions, with none garnering a majority.

The Court's shadow docket is also having an immediate impact on the applicable safeguards for prison health and safety during the pandemic. *See, e.g., Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (mem.) (staying a district court's injunction requiring a Southern California jail to take more

⁴ Available at <https://bit.ly/3db4Ck7>.

extensive and effective measures to protect inmates from exposure to COVID-19); *Williams v. Wilson*, No. 19A1047, 2020 WL 2988458 (U.S. June 4, 2020) (mem.) (temporarily blocking lower court orders requiring a federal prison to evaluate inmates for transfer because of their risk of exposure to COVID-19); *Valentine v. Collier*, 140 S. Ct. 1598 (2020) (mem.) (declining to vacate a Fifth Circuit stay that paused a court order requiring Texas to take steps to protect elderly inmates from the virus).

C. Challenges to Executive Action

The Supreme Court’s shadow docket orders are not limited to time-sensitive issues like the election or COVID-19. The shadow docket has also determined the fate of several high-profile—and highly controversial—executive actions.

For example, before the Supreme Court reached the merits of former-President Trump’s “travel ban”—the three separate executive orders that categorically limited entry into the country for non-citizens from specifically identified foreign countries—the Court permitted aspects of the ban to go into effect through shadow docket orders. During the travel ban litigation, the Trump Administration sought *six* emergency stays of lower court orders from the Supreme Court. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 135 (2019). Several initial court rulings against the original travel ban prompted the government to adopt a modified policy. *Id.* Thereafter, district courts in Maryland and Hawaii enjoined the second iteration of the travel ban on a nationwide basis, *see Int’l Refugee Assistance Proj. v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017); *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017), and the Fourth and Ninth Circuits affirmed in substantial part, *see Trump v. Int’l Refugee Assistance Proj.*, 857 F.3d 554 (4th Cir. 2017) (en banc); *Hawai’i v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017). The federal government sought a stay of those injunctions, arguing that the orders “prevent[ed] the Executive from effectuating his national-security judgment . . . caus[ing] irreparable harm to the government and the public interest.” Application for Stay at 4, *Trump v. Int’l Refugee Assistance Proj.*, No. 16A1190, 137 S. Ct. 2080 (2017) (per curiam). In June 2017, in an unsigned opinion, the Court granted a partial stay of the Maryland and Hawaii injunctions, reinstating much of the ban. *Trump v. Int’l Refugee Assistance Proj.*, 137 S. Ct. 2080, 2088-89 (2017) (per curiam).

The third iteration of the travel ban followed a similar course. After district courts in Maryland and Hawaii entered preliminary injunctions against the revised policy, the Court again granted the federal government’s applications for stays—but this time in their entirety. *Trump v. Hawaii*, 138 S. Ct. 542 (2017) (mem.); *Trump v. Int’l Refugee Assistance Proj.*, 138 S. Ct. 542 (2017) (mem.).

A shadow docket order also effectively ended the period for responding to the 2020 census. After a district court entered an injunction requiring, in light of the pandemic, that the counting period for the 2020 census be extended through October 31, 2020, *Nat’l Urban League v. Ross*, No. 20-CV-5799, 2020 WL 5876939, at *1 (N.D. Cal. Oct. 1, 2020), and the Ninth Circuit declined to stay that portion of the order, 977 F.3d 770, 773 (9th Cir. 2020), the federal government sought a

stay from the Supreme Court. The government argued that extending the timeline for conducting field operations would impede its ability to comply with a statutory deadline at the end of the year. Application for Stay at 21, No. 20A62, *Ross v. Nat'l Urban League*, 141 S. Ct. 18 (2020) (mem.). In a one-paragraph, unsigned order, the Court stayed the injunction extending the deadline. *Ross v. Nat'l Urban League*, 141 S. Ct. 18 (2020) (mem.). Justice Sotomayor dissented, explaining that the potential harms of “rushing this year’s census count,” such as the disproportionate allocation of federal resources, could have a “lasting impact for at least the next 10 years.” *Id.* at 21 (Sotomayor, J., dissenting from grant of stay). But the Court’s order effectively ended the Census Bureau’s field operations. See Adam Liptak & Michael Wines, *Supreme Court Rules That Census Count Can Be Cut Short*, N.Y. Times (Oct. 13, 2020) (“As a practical matter, however, it almost certainly ensures an early end because the census—one of the largest government activities, involving hundreds of thousands of workers—cannot be easily restarted and little time remains before its current deadline at the end of this month.”);⁵ Press Release, U.S. Census Bureau, Census Bureau Statement on 2020 Census Data Collection Ending (Oct. 13, 2020) (“Self-response and field data collection operations for the 2020 Census will conclude on October 15, 2020.”).⁶

In addition, the Court’s shadow docket orders permitted the Trump Administration to continue construction of a physical border wall between the United States and Mexico, despite lower court rulings that would have permanently halted the process. After Congress appropriated only a fraction of the requested funds to construct a border wall, President Trump sought to have the Secretary of the Department of Defense (“DoD”) re-allocate funds earmarked for the military. Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. Times (July 26, 2019).⁷ A district judge in California granted preliminary and then permanent injunctive relief preventing the federal government from “taking any action to construct a border barrier . . . using funds reprogrammed by” DoD. *Sierra Club v. Trump*, No. 19-CV-892, 2019 WL 2715422, at *17 (N.D. Cal. June 28, 2019). After the Ninth Circuit declined to stay the injunction, *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), the federal government sought a stay from the Supreme Court. In an unsigned, one-paragraph order, the Court granted a stay. Justices Ginsburg, Sotomayor, and Kagan indicated they would have denied the application for a stay, and Justice Breyer dissented in part. *Id.* Over the next year, the federal government completed several of the projects that had been permanently enjoined as unlawful by the district court. See Application to Lift Stay at 18-19, *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020) (mem.) (describing construction over the course of a year). And after the Ninth Circuit issued a decision affirming the permanent injunction, the Supreme Court issued another unsigned, one-sentence order—this time rejecting an application to lift its earlier stay. *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020) (mem.). Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented again, noting that the stay could have the effect of a final judgment. *Id.* (Breyer, J., dissenting).

⁵ Available at <https://nyti.ms/3ag511u>.

⁶ Available at <https://bit.ly/2N21oEV>.

⁷ Available at <https://nyti.ms/3ajtCnA>.

D. Death Penalty Litigation

The Supreme Court's shadow docket decisions are also often the final word on whether death row inmates will be executed. It is common for the Court to receive last-minute applications to stay a pending execution. *See, e.g.*, Baude, *supra*, at 10; Stephen M. Shapiro, et al., Supreme Court Practice 351 n.108 (10th ed. 2013) (describing this process); *Barr v. Lee*, 140 S. Ct. 2590 (2020) (per curiam) (vacating a preliminary injunction against four executions); *Barr v. Purkey*, 140 S. Ct. 2594 (2020) (mem.) (vacating a preliminary injunction prohibiting executions). In 2014, the practice made national headlines after Joseph R. Wood, III's execution-by-injection lasted nearly two hours. Fernando Sanchez & John Schwartz, *A Prolonged Execution in Arizona Leads to a Temporary Halt*, N.Y. Times (July 25, 2014).⁸ Mr. Wood's prolonged execution, during which several witnesses alleged that he "gasped, seemingly for air, more than 600 times," came after the Supreme Court decided through short shadow docket orders that the execution could proceed. *Id.*; *see, e.g.*, *Wood v. Arizona*, 573 U.S. 977 (2014) (mem.).

* * *

As these examples make clear, the Supreme Court's shadow docket is increasingly where important and controversial issues are being decided. There are also certain patterns emerging from the shadow docket that set it apart from the Court's merits docket.

First, many of the high-profile shadow docket decisions split 5-4 or 6-3 along the Court's perceived partisan lines. As Professor Steve Vladeck notes, in the first twenty-two cases where the Court granted emergency relief to the Trump Administration, at least two Justices publicly noted dissents seventeen times. Steve Vladeck, *Symposium: The Solicitor General, the Shadow Docket and the Kennedy Effect*, SCOTUSBlog (Oct. 22, 2020).⁹ Nine of the Court's orders in those cases, or 41%, were publicly 5-4 decisions. *Id.* That is in contrast to the merits docket, where 21% of cases on average are resolved in 5-4 opinions (and not all of these are 5-4 ideological divides). *See* Adam Feldman, *Final Stat Pack for October Term 2019 – 5-4 Cases*, SCOTUSBlog (July 10, 2020).¹⁰ And, as noted above, this division on the Court extends beyond cases where the federal government is the party requesting emergency relief. Divisions along the Court's perceived partisan lines are present in shadow docket orders about, among other issues, election administration, *see supra* pp. 3-4; religious gatherings, *see supra* p.4; and the death penalty, *see, e.g.*, *Barr*, 140 S. Ct. at 2590.

Second, shadow docket decisions often lack majority reasoning, full opinions, and a record of the Justices' individual votes. Justice Ginsburg notably remarked that "when a stay is denied, it doesn't mean we are in fact unanimous." Mark Sherman, *Justices silent over execution drug secrecy*, Associated Press (Aug. 4, 2014);¹¹ *see* Elena Kagan, Remarks Commemorating

⁸ Available at <https://nyti.ms/378npZl>.

⁹ Available at <https://bit.ly/3plEoxE>.

¹⁰ Available at <https://bit.ly/2N6gqJY>.

¹¹ Available at <https://bit.ly/3rV4UQ4>.

Celebration 55: The Women’s Leadership Summit, 32 Harv. J. L. & Gender 233, 236 (2009) (discussing un-noted dissents from 1876 order denying Belva Lockwood admission to the Supreme Court bar). As the above-discussed cases demonstrate, many of the shadow docket orders contain no more than one paragraph or even one sentence explaining the disposition. When the lack of information about the Justices’ votes is “combined with the minimal explanations for these rulings, the result is a Court in which we know very little about what the individual Justices think about their own procedures.” Baude, *supra*, at 19.

III. The Problems of Resolving Cases Via the Shadow Docket

Justice Jackson famously wrote of the Supreme Court that “[w]e are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring in result). Conscientious of its role as the “final” word on issues of paramount public importance, the Court has developed robust procedural and deliberative frameworks to ensure the legitimacy—and the perceived legitimacy—of its decision-making. Even on sharply divisive issues like integration, school prayer, abortion, and immigration, the public overwhelmingly respects the Court’s pronouncements as authoritative—a triumph largely attributable to the Court’s strict adherence to an institutional framework that ensures transparency and consistency across cases and court compositions.

The defining feature of the shadow docket is that it represents a deviation from the Supreme Court’s usual fastidious procedures. That deviation may be indispensable for routine matters of docket management. But as the shadow docket takes on increasing importance for resolving pressing issues of American public life, that procedural deviation carries real risks.

A. Deviations at the Input Stage: Diminished Opportunities for Participation and Deliberation

Limited Development in the Lower Courts. The Supreme Court routinely stresses that it is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Adhering to that appellate function ensures that controversies come to the Court fully developed on both the law and the facts. The Court ordinarily refuses to “abandon [its] usual procedures in a rush to judgment without a lower court opinion,” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009), because it relies on fully developed briefing and “thorough lower court opinions to guide [its] analysis of the merits,” *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). Waiting for full disposition below also “guarantees that a factual record will be available to [the Court], thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances,” *Illinois v. Gates*, 462 U.S. 213, 224 (1983), which is why the Court hesitates to address “far-reaching and important questions” if they “are not presented by the record with sufficient clarity to require or justify their decision,” *Mishkin v. New York*, 383 U.S. 502, 512-13 (1966). Indeed, the Court has emphasized that it is necessary to “meticulously observe [those] customary procedural rules” in order to “promote respect for the procedures by which [its] decisions are rendered, as well as confidence in the stability of prior decisions.” *Gates*, 462 U.S. at 224.

Disputes in an emergency posture allow for none of these safeguards that sharpen the focus of the Court's review. When ruling through the shadow docket, the Court may lack a developed record, confront claims unconstrained by the narrowing process of certiorari, or face arguments that lack full consideration through the reasoned opinions of multiple courts of appeal. Recent cases illustrate some of the risks when these constraints evaporate.

First, the Court might opine on sensitive questions unnecessarily. When it comes to the merits docket, the Supreme Court is typically careful not to wade into contentious hot-button disputes unless it has to. For much the same reasons as its “usual practice is to avoid the unnecessary resolution of constitutional questions,” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009), the Court “adhere[s] scrupulously to the customary limitations on [its] discretion” when “difficult issues of great public importance are involved,” *Gates* 462 U.S. at 224; see generally Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961). In both the early travel ban and census litigation, the Court considered multiple requests by the federal government for emergency or extraordinary relief and granted some of them. But those rulings ended up being entirely unnecessary because subsequent events changed the course of litigation and rendered earlier orders moot.

Second, as Professor Vladeck has observed, the posture of these applications usually requires “subjective predictions about how the litigation is likely to unfold,” Vladeck, *The Solicitor General and the Shadow Docket*, *supra*, at 127—predictions that may turn out to be a poor substitute for sustained engagement with the legal issues. To take but one example, last year, when the Justice Department asked the Court to vacate a district court injunction in a challenge to the federal death penalty protocol, three members of the Court wrote to express their view that “[t]he Government has shown that it is very likely to prevail when this question is ultimately decided,” and that “the question . . . is straightforward.” *Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (mem.) (Alito, J., concurring). The case turned out to be anything but, sharply splintering the D.C. Circuit, with “[e]ach member of the panel tak[ing] a different view of what the [Federal Death Penalty Act] require[d]” and all three judges writing separately. *In re Fed. Bureau of Prisons’ Execution Protocol Cases*, 955 F.3d 106, 108 (D.C. Cir. 2020). Although the D.C. Circuit’s opinion failed to produce a controlling interpretation of the statute, the Supreme Court ultimately denied certiorari after reevaluating the case. See *Bourgeois v. Barr*, 141 S. Ct. 180 (2020) (mem.).

Of course, nothing binds a court to its initial assessment, and the law differentiates between preliminary and final relief precisely because the merits of a case may look different after threshold considerations. But—particularly in a world where the Supreme Court has discretion over its own caseload and can manage how and when cases come before it—these early predictive pronouncements represent a sharp break from the Court’s usually nuanced and restrained consideration of merits cases.

Limited Opportunities for Advocacy and Consideration. Lawyers produce their best work when they have adequate opportunities to perform research, consider facts and arguments, and consult colleagues. Supreme Court advocates—and even Supreme Court Justices—are no exception. Especially when compared to the meticulous procedures imposed for merits cases, the accelerated process for the shadow docket sacrifices key opportunities for participation and deliberation. Most visibly, there is no opportunity for oral argument—an often-critical opportunity for the Justices to

clarify the scope of claims, the practical consequences of a particular result, and the specifics of the record. See Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 Cath. U. L. Rev. 529, 530-31 (1984).

Of particular concern to frequent institutional litigants like the District of Columbia, there are also diminished opportunities for the views of *amici curiae*. Issues worthy of the Supreme Court's attention typically affect large swaths of the population. Because the lawyers representing the parties may be focused on narrower legal questions, the Court finds *amicus* briefs "that bring[] to the attention of the Court relevant matter" not addressed by the parties to be "of considerable help." Sup. Ct. R. 37.1. The Court frequently invites the Justice Department to opine on difficult legal questions through *amicus* briefs, and state governments and other stakeholders often file *amicus* briefs to explain the broader context of a case. This Term alone, the District of Columbia has authored or joined multistate *amicus* briefs weighing in on the availability of nominal damages, the Federal Trade Commission's restitution power, and rules incentivizing women and minority-owned media broadcast companies. The availability of high-quality *amicus* briefs is another safeguard for the Court, as these briefs situate a particular dispute in the wider legal, social, and political context.

Although states and other stakeholders may do their best to file *amicus* briefs in emergency litigation (indeed, the District participated in many of the election-related disputes this past fall), the accelerated timelines and unpredictable scheduling of these cases make coordinating *amicus* efforts extremely challenging. And—possibly reflecting a more traditional conception of the shadow docket's role—the Court's official guidance notes that "[t]he filing of *amicus* briefs in connection with emergency applications is strongly discouraged." Sup. Ct., Off. of the Clerk, *Memorandum to Those Intending to File an Amicus Curiae Brief in the Supreme Court of the United States* (Oct. 2019).

All of this means that when the Court confronts novel, controversial issues through the shadow docket, it does so with diminished deliberative tools and far fewer viewpoints than a traditional merits case. To be sure, the litigation choices of the parties play a significant role in *all* cases at the Court—litigants seek out the most experienced counsel for that very reason. But in a narrower framing shorn of outside perspective, the strategic framing choices of lawyers on behalf of a particular client necessarily exert greater influence. Indeed, commentators have speculated that shadow docket cases raising identical issues have produced opposite results entirely because of the lawyers' framing. See William Baude, *Death and the Shadow Docket*, Volokh Conspiracy (Apr. 12, 2019) (citing discussion "that different lawyering or different *amicus* participation made the difference").¹²

Limited Opportunities for Deliberation (and Compromise). The final difference is the simplest, but potentially one of the most profound. While the Justices traditionally discuss cases at private conferences with longstanding traditions governing everything from the order in which the Justices speak to which Justice holds the door, the unpredictability of emergency litigation can deprive the Justices of this deliberative opportunity. Last April, for example, the Court ruled 5-4 to vacate a stay of execution, and in a sharply worded dissent joined by three colleagues, Justice Breyer

¹² Available at <https://bit.ly/3aq8Z9h>.

revealed that he had “requested that the Court take no action until tomorrow, when the matter could be discussed at Conference,” but the “Court nevertheless grant[ed] the State’s application to vacate the stay”—a ruling handed down “in the middle of the night without giving all Members of the Court the opportunity for discussion.” *Dunn v. Price*, 139 S. Ct. 1312, 1314-15 (2019) (mem.) (Breyer, J., dissenting). Regardless of what one thinks about the merits of executions, that process “is no way to run a railroad.” Baude, *Death and the Shadow Docket*, *supra*.

B. Deviations at the Output Stage: Less Accountability, Less Guidance, Less Confidence

Even if the Supreme Court’s consideration of cases on the shadow docket *were* as procedurally rigorous as its consideration of merits cases, there are still reasons to be concerned about the shift toward resolving major disputes on the shadow docket. Because shadow docket orders do not always disclose voting tallies and range from a single sentence to just a handful of pages, the public is often left with little more than a bottom-line. This lack of explanation for major rulings exacts significant costs from regulated parties, lower courts, and the public at large.

Limited Accountability. As explained, the Justices do not always make their votes public in shadow docket cases. Although Justices may register their dissent, the lack of a registered dissent “doesn’t mean [the Justices] are in fact unanimous.” Sherman, *supra*. Even in sharply divided cases, we may not know who on the Court joined the majority; indeed, just last week, a “mystery” Justice joined Justices Barrett, Breyer, Kagan, and Sotomayor to halt an execution. See Mark Joseph Stern, *Amy Coney Barrett Joins Liberals and a Mystery Justice to Block Execution*, Slate (Feb. 12, 2021).¹³

Although the Court’s deliberative processes should generally be confidential, anonymous voting in a divisive case is troubling. As Justice Scalia explained, signing one’s name to a decision provides a key measure of accountability: even if a Justice does not “personally write the majority or the dissent, their name will be subscribed to the one view or the other. They cannot, without risk of public embarrassment, meander back and forth—today providing the fifth vote for a disposition that rests upon one theory of law, and tomorrow providing the fifth vote for a disposition that presumes the opposite.” Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33, 42 (1994); see Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 139-40 (1990) (“Disclosure of votes and opinion writers . . . serves to hold the individual judge accountable” and “puts the judge’s conscience and reputation on the line.”). No one contends that every Justice must disclose every objection to a scheduling order, but a “mystery Justice” casting the tie-breaking vote in a 5-4 case affects the public’s perception of the Court’s consistency and fairness.

Limited Reasoning. Even when the vote tally is clear, shadow docket orders often contain little explanation. In the aforementioned challenge to President Trump’s construction of the border wall, for example, the Ninth Circuit issued a 38-page opinion explaining why a stay of the district court’s injunction was unwarranted, which included a significant analysis of why the plaintiffs had

¹³ Available at <https://bit.ly/2Zpc5UI>.

a cause of action to seek relief. *Sierra Club*, 929 F.3d at 677, 699. By a vote of five Justices, the Supreme Court stayed the injunction in a one-paragraph order, simply writing that “[a]mong the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action.” *Sierra Club*, 140 S. Ct. at 1.

High-profile decisions handed down without explanation come at a significant public cost. *See, e.g.*, John Rawls, *Political Liberalism* 218 (expanded ed. 2005) (“As reasonable and rational, and knowing that [citizens] affirm a diversity of reasonable religious and philosophical doctrines, they should be ready to explain the basis of their actions to one another.”); *see generally* Amy Gutmann & Dennis F. Thompson, *Democracy and Disagreement* (1998). Transparent decision-making, grounded in consistent and publicly available reasoning, promotes confidence that the exercise of power is non-arbitrary and principled. *See generally* Tom R. Tyler, *Why People Obey The Law* (2d ed. 2006). Conversely, bottom-line edicts, issued without explanation, do little to explain why issues of principle dictate what may be harsh results for many. *See, e.g.*, Shoba Sivaprasad Wadhia, *Symposium: From the travel ban to the border wall, restrictive immigration policies thrive on the shadow docket*, SCOTUSBlog (Oct. 27, 2020).¹⁴

Limited Guidance. Summary orders also create significant practical hurdles for regulated parties and lower courts. To begin, these decisions may have unclear legal effects. District Judge Trevor McFadden has argued that different types of shadow docket decisions may have different levels of precedential value for lower courts. *See* Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBlog (Oct. 28, 2020) (arguing that denials of stay applications and “in-chambers” opinions are not binding on lower courts, but stay decisions that express a majority view on the merits are entitled to deference).¹⁵ But there is “scant case law or academic literature on this issue, nor is there a consensus among those who have considered it.” *Id.*

Regardless of the doctrinal status of these orders, when the Supreme Court speaks, legal institutions and stakeholders listen. Although many of the summary orders on the shadow docket do not formally announce new “rules” to bind future cases, “carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” *United States v. Dorcelly*, 454 F.3d 366, 375 (D.C. Cir. 2006). Lower courts work hard to faithfully apply the Supreme Court’s instructions but, with limited guidance, they can struggle to divine workable standards or rules from the Court’s minimal reasoning. For example, after the Court granted a stay in *Herbert v. Kitchen*, 571 U.S. 1116 (2014) (mem.), a case involving challenges to government restrictions on same-sex marriage, the Ninth Circuit granted a similar stay, with one judge noting in a concurrence that

although the Supreme Court’s terse two-sentence order [in *Herbert*] did not offer a statement of reasons [and] is not in the strictest sense precedential, it provides a

¹⁴ Available at <https://bit.ly/3diPjWq>.

¹⁵ Available at <https://bit.ly/3jLVUKh>.

clear message—the Court (without noted dissent) decided that district court injunctions against the application of laws forbidding same-sex unions should be stayed at the request of state authorities pending court of appeals review.

Latta v. Otter, No. 14-35420, 2014 WL 12618172, at *2 (9th Cir. May 20, 2014) (Hurwitz, J., concurring). Other circuits have attempted to divine meaning from shadow docket orders, with mixed success. *Compare Democratic Nat’l Comm. v. Bostelmann*, 977 F.3d 639, 642 (7th Cir. 2020) (staying a district court injunction extending voting deadlines because “[t]he [Supreme] Court has consistently stayed orders by which federal judges have used COVID-19 as a reason to displace the decisions of the policymaking branches of government” (citing summary stay orders)), *with id.* at 645 (Rover, J., dissenting) (“[T]he Supreme Court’s pattern of staying similar sorts of injunctions in recent months is long on signaling but short on concrete principles that lower courts can apply to the specific facts before them. Until the Supreme Court gives us more guidance than *Purcell* [*v. Gonzalez*, 549 U.S. 1 (2006),] and an occasional sentence or two in its stay rulings have provided, all that lower courts can do—and, I submit, must do—is carefully evaluate emergent circumstances that threaten to interfere with the right to vote.”).

This lack of clarity from the Supreme Court is especially problematic for jurisdictions, like the District of Columbia, that strive to accurately implement the Court’s directives related to the COVID-19 pandemic. The Court has issued many shadow docket rulings on gathering-size restrictions and other state measures designed to protect public health, *see* Stephen Wermiel, *Symposium: Coronavirus litigation lurks in the shadows*, SCOTUSBlog (Oct. 26, 2020) (surveying COVID-19-related litigation),¹⁶ but the scope of these rulings is often unclear. As mentioned, the Court this month issued a fractured shadow docket order striking down California’s prohibition on indoor worship but allowing capacity restrictions. *S. Bay United Pentecostal Church*, 2021 WL 406258, at *1. Troublingly, the order provides no consensus on what animated the Court’s conclusion, making it difficult for other jurisdictions to enact policies in the face of COVID-19. *See id.* at *6 (Kagan, J., dissenting in part) (“[W]ho knows what today’s decision will mean for other restrictions challenged in other cases? . . . When are such capacity limits permissible, and when are they not? And is an indoor ban never allowed, or just not in this case? Most important—do the answers to those questions or similar ones turn on record evidence about epidemiology, or on naked judicial instinct? The Court’s decision leaves state policymakers adrift, in California and elsewhere.”).

IV. Addressing The Shadow Docket

Most of the contentious issues on the shadow docket come to the Supreme Court as emergency applications, stay requests, or petitions for certiorari before judgment. Issues with the shadow docket are thus problems related to the Court’s *appellate jurisdiction*—its supervisory function over the lower federal courts. This means that Congress has the ability to address them. While I will leave it to others to explore the precise mechanisms and policy fixes that might mitigate issues with the shadow docket, I want to emphasize the high-level point that the Constitution plainly empowers Congress to act in this space.

¹⁶ Available at <https://bit.ly/37bIC4U>.

The text of Article III confirms that Congress may control the Court’s exercise of appellate jurisdiction: “In all [non-original] cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and *under such Regulations* as the Congress shall make.” U.S. Const. Art. III, § 2, Cl. 2 (emphasis added). That power is not theoretical, as Congress already exercises substantial control over the Court’s appellate jurisdiction by statute. *See, e.g.*, 28 U.S.C. § 1254 (specifying how “[c]ases in the courts of appeals may be reviewed by the Supreme Court”); *id.* § 1257(a) (prescribing the mechanism by which “[f]inal judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court.”). Congress has—successfully and within constitutional bounds—adjusted this jurisdiction by statute at numerous points in American history. *See, e.g.*, Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656 (granting the Supreme Court appellate jurisdiction over capital cases); Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790 (granting the Supreme Court appellate jurisdiction over cases in which a state court had upheld claims under the Constitution or federal statutes). And, as the Supreme Court itself recently confirmed, Congress’s power over how cases move through the federal system is broad: “[s]o long as Congress does not violate other constitutional provisions, its ‘control over the jurisdiction of the federal courts’ is ‘plenary.’” *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (quoting *Trainmen v. Toledo, P. & W.R. Co.*, 321 U.S. 50, 63-64 (1944)).

Congress also wields substantial power over how the federal courts address emergency applications or stays. Congress may “alter[] the relevant underlying law,” for example, by “restrict[ing] courts’ authority to issue and enforce prospective relief” or “requiring that such relief be supported by findings and precisely tailored.” *Miller v. French*, 530 U.S. 327, 347 (2000) (upholding a challenged portion of the Prison Litigation Reform Act). And Congress can explore its authority over the Federal Rules of Civil and Appellate Procedure, which already prescribe some constraints for injunctive stays pending appeal, *see* Fed. R. Civ. P. 62(c); Fed. R. App. P. 8(a), and require that “[e]very order granting an injunction and every restraining order. . . state the reasons why it issued,” Fed. R. Civ. P. 65(d)(1)(A). Should the Subcommittee conclude that additional procedural safeguards are necessary, the federal rules offer another avenue for reform.

CONCLUSION

Thank you for the opportunity to share the views of the Office of the Attorney General for the District of Columbia with you today.